NOT DESIGNATED FOR PUBLICATION

DIVISION IV

CACR06-293

January 17, 2007

ARNOLDO PEDRAZA APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT [NO. CR-04-812]
V.	HONORABLE JAMES ROBERT MARSCHEWSKI, CIRCUIT JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOSEPHINE LINKER HART, Judge

A jury found appellant, Arnoldo Pedraza, guilty of possession of methamphetamine with the intent to deliver, possession of drug paraphernalia, and maintaining a premises for drug sales, and he was sentenced to a total of ten years' imprisonment. On appeal, he first argues that the circuit court erred in denying his motion to suppress evidence seized pursuant to a search warrant, contending that the search-warrant affidavit failed to establish the confidential informant's reliability. Second, he argues that the court erred in denying his motion for a mistrial made during the State's rebuttal closing argument. We affirm.

We first discuss appellant's argument that the affidavit failed to establish the confidential informant's reliability. At the suppression hearing, the State introduced an affidavit for search warrant sworn by Eric Williams of the Fort Smith Police Department, who was assigned to the Narcotics Unit. The affidavit provided in part as follows:

> Recently our Unit has had occasion to work in cooperation with a confidential informant hereinafter referred to as CI. This CI has led to at least 3 felony drug arrests. The CI has also provided our Unit with information which has been proven through intelligence and other sources to be true and correct.
>
> Within the past 24 hours, the CI has been within the residence located at 1814 No. J Street, Fort Smith, Arkansas and while within that residence has seen drug paraphernalia consisting of scales, smoking devices which are used to smoke Methamphetamine as well as a quantity of Methamphetamine. The CI is familiar with Methamphetamine and can recognize it on sight and stated that the substance within the residence appeared to be Methamphetamine.
>
> According to the CI, the individuals living at this residence are Arnoldo Pedraza and Juan Pedraza.

A search warrant for the premises was issued and executed, and items of contraband were seized at the residence.

On appeal, appellant argues that the court erred in denying his motion to suppress because the affidavit does not establish the reliability of the confidential informant, particularly noting that the affidavit does not describe the confidential informant as "reliable." Rule 13.1(b) of the Arkansas Rules of Criminal Procedure provides that "[i]f an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained." Rule 13.1(b) further provides that "[f]ailure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing information to the affiant shall not require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial

basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place." As noted in *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994), Rule 13.1(b) sets forth a totality-of-the-circumstances analysis.

We conclude that *Heard* is controlling. There, the defendant argued that the warrant was defective because the affidavit failed to state facts bearing on the informant's reliability. The affidavit provided that during the investigation, the affiant "received information from a person proven to be reliable on several occasions, who has observed cocaine being possessed, used, and sold at the above described residence." *Id*. at 735-36, 876 S.W.2d at 233-34. The Arkansas Supreme Court concluded that "[t]he affidavit in this case, when viewed as a whole, provided a substantial basis for cause to believe that the cocaine would be found at the house." *Id*. at 737, 876 S.W.2d at 234.

While we acknowledge that the affidavit here does not use the word "reliable," we note that the affidavit does "set forth particular facts bearing on the informant's reliability." We further observe that the affidavit in the case at bar provides as much information as the affidavit in *Heard*. Consequently, as in *Heard*, the affidavit in this case, when viewed as a whole, provided a substantial basis for cause to believe that the contraband would be found at the house. Thus, we hold that the trial court did not err in denying appellant's motion to suppress.

Appellant's second point concerns his motion for mistrial made during the State's rebuttal closing argument. During his co-defendant's closing argument, counsel for the co-

defendant stated that the confidential informant was charged with the same charges as appellant. In discussing the confidential informant, co-defendant's counsel further stated as follows:

> I'm a person facing these kinds of charges, and I'm cooperating with the police, and they are expecting results. I've already shown an inclination not to obey the law. Might I consider planting evidence? Sure. It's a possibility. It's a distinct possibility. Common sense, good judgment indicates that it is, in fact a possibility.

The co-defendant's counsel then went on to discuss Williams's testimony, arguing that, in response to counsel for appellant's questioning, Williams indicated that it was possible that the confidential informant could have had illegal drugs in his or her possession. Then, during appellant's closing argument, counsel for appellant argued as follows:

> Detective Williams testified that they didn't watch the house the entire time. It's possible somebody else went in there and planted the drugs. As [counsel for appellant's co-defendant] said, the confidential informant is trying to work [h]is way out of trouble. He has a reason to lie.

The State then presented its rebuttal closing argument, stating as follows:

> I ask you if it's reasonable to believe that a CI came in and planted all of this evidence at this residence. He came in and spread it all through the house, in this northeast bedroom, in a dresser, on the bed, in the southeast bedroom, in the kitchen, [on] Maria's person—do you think it's reasonable that someone could come into this home where four adults were living, where there are three children, and people were coming and going, and nobody saw this person do it? Is it reasonable to think that this thing happened? I submit to you no. And, most importantly, we've not heard one shred of evidence today that that happened. No one has testified—

At that point, appellant's counsel moved for a mistrial, arguing that the State had shifted the burden to the defense. The court denied the motion. Appellant's counsel further asked that

the court instruct the jury that it was the State's burden to prove guilt and that there was nothing wrong with appellant not testifying. The court ruled that the State's argument was "legitimate concerning the fact that they've [the defendants] brought out the fact that someone has planted this, and they could have brought out all of this evidence that had been planted through the police, but there's not been one witness that's testified that that even occurred. I don't believe that's shifting the burden." The court denied the request.

On appeal, appellant argues that the court erred in denying his motion for mistrial because the State improperly commented on appellant's failure to testify. We conclude, however, that the State's rebuttal closing argument was in response to appellant's closing argument. Appellant cannot argue in his closing that the evidence was planted and then complain about the prosecutor's rebuttal closing argument responding to that assertion. Appellant opened the door to the State's comment; he cannot complain about it now. *Dickerson v. State*, 363 Ark. 437, ___ S.W.3d ___ (2005) (holding that because the defendant opened the door to the State's comment made during rebuttal closing argument, it was not an improper comment on the defendant's failure to testify). Thus, we hold that the State's remark was not an improper comment on appellant's failure to testify.

Affirmed.

BIRD and GRIFFEN, JJ., agree.